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JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1904.

THE UNITED STATES, PETITIONER,
v.
THE CORNELL STEAMBOAT COMPANY, RESPONDENT.

No. 634

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PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT, AND BRIEF.

The Solicitor-General, on behalf of the United States, respectfully prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit in the above-entitled case affirming that of the District Court for the Southern District of New York awarding respondent, as salvage, 10 per cent of the duties paid upon a cargo of sugar alleged to have been saved by it from destruction by fire.

The judgment below was based upon the theory that if the sugar had been destroyed the United States would have been obliged to refund the duties under section 2984 Revised Statutes, which provides:

> SEC. 2984. The Secretary of the Treasury is hereby *authorized*, upon production of satisfactory proof *to him* of the actual [industry] [injury] or destruction, in whole or in part, of any merchandise, by *accidental fire*, or other casualty,

while the same remained in the custody of the officers of the customs in any public or private warehouse under bond, or in the appraisers' stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs, *to abate or refund*, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon, and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part, as the case may be.

The case presents several questions of special importance.

1. Have Federal courts jurisdiction under the Tucker Act of a suit like this against the Government arising under the revenue laws?

2. Are import duties subject to salvage claims?

3. Under Admiralty rule 19, will a salvage suit *in personam* lie against the Government for saving duties when it did not request the service?

4. Under section 2984 R. S., may the courts, in advance of a decision by the Secretary of the Treasury, and upon a hypothetical case, determine that a refund must have been made if the goods had been destroyed?

This suit is an invasion of the revenue system. The attack upon import duties is novel and unprecedented. Admiralty rule 19 has been entirely ignored. The application of section 2985 Revised Statutes is unwarranted, and may subject the Government to no end of claims and litigation in the courts. Substantial grounds for issuing the writ of certiorari are therefore presented.

STATEMENT OF CASE.

In January, 1901, a tug belonging to respondent is alleged to have saved from destruction by fire, in the port of New York, certain imported sugar, on which duties amounting to $6,000 had been paid. The sugar was on a lighter, not owned by the United States, and was in possession and control of custom-house officers, not having been delivered to consignees. (R., 4, 12, 13.)

The owners of the lighter paid respondent for the service rendered them. (R., 4.)

Respondent libeled the sugar in the District Court, Eastern District of New York, and was awarded 10 per cent of its value with the duties unpaid. (*Cornell Steamboat Co.* v. *1,883 Bags of Sugar*, 108 Fed., 277.) Respondent contended the duty should be included in estimating the award, but the court held the amount saved the owner was the value of the sugar less the duty, because, if the sugar had been burned, the United States would have been obliged to return the duty paid under section 2984 Revised Statutes.

That decision was acquiesced in, and thereafter this proceeding *in personam* against the United States was

brought in the District Court, Southern District of New York, for the recovery of salvage on the duties—the petition setting forth the facts substantially as above stated.

The United States demurred, alleging (1) the court had no jurisdiction of the alleged cause of action, and (2) the petition did not state facts sufficient to constitute a cause of action. (R., 9.)

The demurrer was overruled (R., 10), answer filed withdrawn, and the cause submitted. (R., 11.)

The court filed a written opinion with a finding of facts and conclusions of law. (R., 12.)

Judgment was rendered for $600—10 per cent of the duties paid. (R., 17.)

The Circuit Court of Appeals affirmed the judgment (R., 24), one judge dissenting. (R., 33.)

ARGUMENT.

I.

Being a Suit Under a Revenue Law, the District Court was Without Jurisdiction.

Jurisdiction is supposed to be conferred by the Tucker Act (act of March 3, 1887, c. 359, 24 Stat., 505), conferring upon the District and Circuit Courts concurrent jurisdiction with the Court of Claims of certain claims against the United States.

But this suit rests upon the alleged obligation of the United States, under section 2984 R. S., to refund duties upon goods destroyed by fire while in the custody of customs officers. It is therefore a suit arising under a revenue law.

In *Nichols* v. *United States* (7 Wall., 122), this court held that cases arising under the revenue laws are not within the jurisdiction of the Court of Claims, those laws constituting a distinct *system* of collection and redress.

The Nichols case was followed in *D. M. Ferry Co.* v. *United States* (85 Fed., 550), Circuit Court of Appeals, Sixth Circuit, opinion by Judge Taft. That was a suit in the Circuit Court under the very statute here relied on, for a refund of duties upon merchandise destroyed by accidental fire. The Treasury Department had refused to refund because at the time of the fire the goods were not in the custody of the customs officers, having been delivered to plaintiff under bond.

After referring to the Nichols case to show that cases arising under the revenue laws are not within the jurisdiction of the Federal courts under the Tucker Act, Judge Taft said (p. 555):

> To avoid the effect of the Nichols case upon the question before us, it is pointed out that in that case the revenue laws themselves provided a remedy by which the taxpayer might bring the Secretary's decision under review in the courts, but that here there is no such provision. This is true, but the Nichols case did not proceed on the ground that there had been an appeal to the courts provided for within the revenue acts themselves; nor was it intimated that a suit in the Court of Claims would have been permitted had no such appeal to the courts been provided. On the contrary, the plain effect of the decision is that if the intention of

> Congress is manifest to create the Secretary of the Treasury a tribunal to decide whether a wrong has been committed under the revenue law, and has made no provision for an appeal, because the revenue law provides a complete system in itself, the presumption must be that it intended to make the decision of the special tribunal thus established final.

Nichols v. *United States* was also followed in—

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Treat v. *Staples*, Circuit Court D. Maine, 1870 (1 Holmes 5; 24 Fed. Cas. No. 14,162), holding replevin does not lie to recover vessel seized for taxes by revenue collector.

II.

Import duties are not subject to salvage claims.

Import duties are a burden which goods must bear as a privilege or condition for entering the country. The right of the United States to exact them is not dependent upon the act of the salvor, but arises from the fact that they have actually entered the country, however they may have arrived. Whether brought in by the owner, or entered by the salvor to whom they had been abandoned, the duties must be paid.

It is immaterial that the duties paid might have been recovered by the importer if the goods had been

destroyed. The benefit to the United States would be as great, and the claim for salvage equally strong, if the duties had not been paid. Under section 2984 the Secretary of the Treasury is authorized not only to refund duties paid, in case of the injury or destruction of the goods by accidental fire or other casualty, but to abate those not paid. In either case the act of the salvor works the same advantage to the Government—it enables the collection of duty upon goods which otherwise might not have entered.

Salvage is for benefit, but salving an importation does not benefit the Government. Importation responds to demand, and if one cargo be lost the demand will bring in another, upon which duty must be paid.

The allowance of salvage upon duties lessens the revenue just so much.

The claim of respondents is novel and unprecedented. Question has been made, as it was made by respondents in their action against the sugar, as to whether duties should not be included in estimating the value of the goods salved. Independently of section 2984 it has been held that duties upon wrecked property should be paid out of the gross proceeds before deducting salvage.

Concklin v. *The Harmony*, District Court, D. New York, 1797, 1 Pet. Adm., 34, note; 6 Fed. Cas., No. 3,089.

The Waterloo, Id. 1830, Blatchf. & H., 114; 29 Fed. Cas., No. 17,257.

In *Tucker* v. *The Mary C. Potter*, District Court, D. So. Car. (24 Fed. Cas. 14,223), it was held that, in respect to the lien of salvage, customs duties constituted the prior debt.

In respondent's suit against the sugar the court held the duty "could not properly be the subject of salvage, and its loss, moreover, would have been the loss of the Government, which had no interest in or relation to the property, and could not be made a party, or affected by the salvage award."

Cornell Steamboat Co. v. *1,883 Bags of Sugar*, 108 Fed., 277.

Salvage only arises in respect to *vessels* or their *cargoes.*

Cope v. *Vallette Dry Dock Company*, 119 U. S., 625.

In that case the court said (p. 629):

> If we search through all the books, from the rules of Oleron to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued.

Bills of exchange and other evidences of debt or title to property have been held to be excepted from the cargo subject to salvage, because, if sold, no property right could be transferred to the purchaser.

The Emblem, District Court, D. Maine, 1840, 2 Ware, 68; 8 Fed. Cas., No. 4,454.

So salvage can not be awarded for saving the United States mails, because not liable to detention and sale.

> *The Merchant*, District Court, S. D. Florida, 1851, 4 Adm. Rec., 544; 17 Fed. Cas., No. 9,435.

In the cases just referred to something tangible was saved, but it was held from its nature not subject to salvage. In the present case no tangible property was saved to the Government.

The expenses of salvage services are, as a general rule, to be apportioned ratably among the *ship*, *freight*, and *cargo*, according to the principles of general average.

> 24 A. & E. Ency. Law, 2d ed., p. 1219, and cases cited.
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> Lowndes' Law of General Average, 89.

Parsons in his work on Shipping and Admiralty, vol. 2, p. 302, says:

> Salvage is generally decreed on *all* the property saved, whether *ship*, *cargo*, or *freight*.

Up to the present time nothing else appears to have been thought liable.

The primary action is *in rem* against the thing salved.

In *The Emblem*, above cited, the court said:

> All the authorities speak of the right of the salvor as attaching to the thing, and not as the foundation of any personal claim against the owner, independent of the goods saved. The customs of the sea, as we have them collected in all the old maritime codes, treat the salvor's

> claim in the same way as a right against the property saved, and the usual mode of compensating the service is by the allowance of a certain portion of the goods saved or of their value. The service is nowhere spoken of as constituting the ground of a personal claim against the owners.

The personal action is subsidiary, and only arises where the *res* has been clandestinely removed or destroyed.

In *The Sabine* (101 U. S., 390), the court said:

> Unless the property saved is destroyed after having been restored or is clandestinely removed from the jurisdiction, the salvors require no more convenient or effectual remedy than the action *in rem* against the property, *as their compensation can not exceed its value*, and if destroyed without their fault, or removed from the jurisdiction to defeat their remedy, no doubt is entertained that they may proceed in personam against the *owners* of the salved property, though the case is not specifically provided for in the nineteenth rule.

Here the cargo was not removed or destroyed, hence the proceeding *in rem* against it was respondent's convenient and effectual remedy. Being limited in any event to the value of the *res*, it is immaterial to the Government how that value was determined.

In *The Independence*, Circuit Court, D. Mass., 1855 (2 Curt., 350; 13 Fed. Cas., No. 7,014), Mr. Justice Curtis said:

> I agree also with Judge Ware that the right

of the salvor is merely a right to proceed against the thing saved to obtain his satisfaction, and not a personal claim on the owner, unless he has, by taking possession of the thing saved, thereby rendered himself personally liable for the reward. (*The Emblem*, 2 Ware, 68.) And I do not understand that the nineteenth of the admiralty rules was intended to change this law.

III.

The case is not within Admiralty Rule 19, because the Government did not request the service.

That rule provides:

> Suits for salvage may be *in rem* against the property saved or the proceeds thereof, or *in personam* against the party *at whose request and for whose benefit* the salvage service was performed.

In *The Sabine* (101 U. S., 384, 386) the court said an action *in personam* for salvage services would not lie against consignees to whom the cargo saved had been delivered, because they had not requested the service (p. 387):

> Libellants in a suit for collision may proceed against the ship and master or against the ship alone, or *in personam* against the master or owner alone, but the terms of the nineteenth rule are different, limiting the right of the salvor to a suit *in rem* against the property saved or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service was performed.

> Important service, it may be assumed, was rendered by the libellants, but they were neither employed or sent out by the consignees, nor did the consignees request them to go to the assistance or relief of the ship or cargo.

Nor could they sue the owners (p. 389):

> The libellants insist that the form of the libel may be supported under the last clause of the rule, which gives the right to an action *in personam* against the party at whose request and for whose benefit the salvage service was performed, and their argument is that the service in the case resulted in a benefit to the owners of the cargo; but the case fails to show that the owners of the cargo ever requested the service, and it is clear that they are not joined in the libel. They, the libellants, must show the request and the benefit, and unless they show that both concur they can not make out a case, even within their own theory.

See Henry on Admiralty Jurisdiction and Procedure, sec. 116, pp. 323–4, commenting on this decision.

In respondent's action against the sugar, the court said (*Cornell Steamboat Co.* v. *1,883 Bags of Sugar*, 108 Fed., 278):

> But under the fourteenth [nineteenth] admiralty rule the United States could not be a party to this suit. It could not be a claimant. It had no relation to the *res* that enabled it to become either a respondent or a claimant, and is indifferent whether an award be granted or withheld.

That a libel *in rem* against the goods salved can

not affect the right of the Government to collect or retain the duties thereon seems conclusive that it has no such interest in the goods as subjects it to a suit *in personam*.

The English cases upon which the Circuit Court of Appeals relied are not in point, for in both the parties sued had such an interest in the thing saved as entitled them to become claimants.

Five Steel Barges, 8 Prob. Div., 142.
The Port Victor, 9 Asp. Mar. Law Cas., N. S., 163.

IV.

Under section 2984 R. S. the courts can not determine in advance of decision by the Secretary of the Treasury, and upon a hypothetical case merely, that duties should be refunded.

In *D. M. Ferry Co.* v. *United States* (85 Fed., 551), the Circuit Court of Appeals for the Sixth Circuit, held that section 2984 made the Secretary the final and exclusive judge of claims for refundment of duties.

The power of Congress to intrust to a special tribunal, or to an administrative officer, final decision of questions of this sort can not be doubted.

Murray's Lessee v. *Hoboken Land & Imp. Co.*, 18 How., 272.
Hilton v. *Merritt, Collector*, 110 U. S., 97.
Hadden v. *Merritt*, 115 U. S., 25.
Bushnell v. *Leland*, 164 U. S., 684.
Gardner v. *Bonestell*, 180 U. S., 369.
Bates & Guild Co. v. *Payne*, 194 U. S., 106.

Obviously, if the courts may not review the decision of the Secretary rendered pursuant to section 2984

upon an *actual* case, they have no authority, in advance of a decision by him, and upon a *hypothetical* case merely, to say that the Government would have been obliged to refund.

But even if the decision of the Secretary, under section 2984, were reviewable by the courts, that fact would itself be an argument against a determination in advance. Upon no ground, however, can the action of the courts in passing upon a hypothetical case be justified.

The Circuit Court of Appeals held that section 2984 was mandatory. But that is immaterial, since no case requiring action by the Secretary ever arose. And the fact that the duty of the Secretary to act is mandatory does not authorize the courts to act for him.

It is said the demurrer admits that the goods would have been destroyed but for the salvors. But it was neither alleged nor conceded, since the fact was otherwise, that the goods had been destroyed and proof to that effect satisfactory to the Secretary had been made, as the statute requires. Besides, the petition merely states that the sugar "was in danger of being destroyed by fire" and was saved "from destruction by said fire," whereas section 2984 refers only to "*accidental* fire," and there was no proof that the fire was accidental.

Because of the importance of the questions involved and the manifest error committed, the writ prayed should issue.

HENRY M. HOYT,
Solicitor-General.

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The judgment below was based upon the theory that if the sugar had been destroyed the United States would have been obliged to refund the duties under section 2984 Revised Statutes, which provides:

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while the same remained in the custody of the officers of the customs in any public or private warehouse under bond, or in the appraisers' stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs, *to abate or refund*, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon, and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part, as the case may be.

The case presents several questions of special importance.

1. Have Federal courts jurisdiction under the Tucker Act of a suit like this against the Government arising under the revenue laws?

2. Are import duties subject to salvage claims?

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STATEMENT OF CASE.

In January, 1901, a tug belonging to respondent is alleged to have saved from destruction by fire, in the port of New York, certain imported sugar, on which duties amounting to $6,000 had been paid. The sugar was on a lighter, not owned by the United States, and was in possession and control of custom-house officers, not having been delivered to consignees. (R., 4, 12, 13.)

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brought in the District Court, Southern District of New York, for the recovery of salvage on the duties—the petition setting forth the facts substantially as above stated.

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I.

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Here the cargo was not removed or destroyed, hence the proceeding *in rem* against it was respondent's convenient and effectual remedy. Being limited in any event to the value of the *res*, it is immaterial to the Government how that value was determined.

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III.

The case is not within Admiralty Rule 19, because the Government did not request the service.

That rule provides:

> Suits for salvage may be *in rem* against the property saved or the proceeds thereof, or *in personam* against the party *at whose request and for whose benefit* the salvage service was performed.

In *The Sabine* (101 U. S., 384, 386) the court said an action *in personam* for salvage services would not lie against consignees to whom the cargo saved had been delivered, because they had not requested the service (p. 387):

> Libellants in a suit for collision may proceed against the ship and master or against the ship alone, or *in personam* against the master or owner alone, but the terms of the nineteenth rule are different, limiting the right of the salvor to a suit *in rem* against the property saved or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service was performed.

> Important service, it may be assumed, was rendered by the libellants, but they were neither employed or sent out by the consignees, nor did the consignees request them to go to the assistance or relief of the ship or cargo.

Nor could they sue the owners (p. 389):

> The libellants insist that the form of the libel may be supported under the last clause of the rule, which gives the right to an action *in personam* against the party at whose request and for whose benefit the salvage service was performed, and their argument is that the service in the case resulted in a benefit to the owners of the cargo; but the case fails to show that the owners of the cargo ever requested the service, and it is clear that they are not joined in the libel. They, the libellants, must show the request and the benefit, and unless they show that both concur they can not make out a case, even within their own theory.

See Henry on Admiralty Jurisdiction and Procedure, sec. 116, pp. 323–4, commenting on this decision.

In respondent's action against the sugar, the court said (*Cornell Steamboat Co.* v. *1,883 Bags of Sugar*, 108 Fed., 278):

> But under the fourteenth [nineteenth] admiralty rule the United States could not be a party to this suit. It could not be a claimant. It had no relation to the *res* that enabled it to become either a respondent or a claimant, and is indifferent whether an award be granted or withheld.

That a libel *in rem* against the goods salved can

not affect the right of the Government to collect or retain the duties thereon seems conclusive that it has no such interest in the goods as subjects it to a suit *in personam*.

The English cases upon which the Circuit Court of Appeals relied are not in point, for in both the parties sued had such an interest in the thing saved as entitled them to become claimants.

Five Steel Barges, 8 Prob. Div., 142.
The Port Victor, 9 Asp. Mar. Law Cas., N. S., 163.

IV.

Under section 2984 R. S. the courts can not determine in advance of decision by the Secretary of the Treasury, and upon a hypothetical case merely, that duties should be refunded.

In *D. M. Ferry Co.* v. *United States* (85 Fed., 551), the Circuit Court of Appeals for the Sixth Circuit, held that section 2984 made the Secretary the final and exclusive judge of claims for refundment of duties.

The power of Congress to intrust to a special tribunal, or to an administrative officer, final decision of questions of this sort can not be doubted.

Murray's Lessee v. *Hoboken Land & Imp. Co.*, 18 How., 272.
Hilton v. *Merritt, Collector*, 110 U. S., 97.
Hadden v. *Merritt*, 115 U. S., 25.
Bushnell v. *Leland*, 164 U. S., 684.
Gardner v. *Bonestell*, 180 U. S., 369.
Bates & Guild Co. v. *Payne*, 194 U. S., 106.

Obviously, if the courts may not review the decision of the Secretary rendered pursuant to section 2984

upon an *actual* case, they have no authority, in advance of a decision by him, and upon a *hypothetical* case merely, to say that the Government would have been obliged to refund.

But even if the decision of the Secretary, under section 2984, were reviewable by the courts, that fact would itself be an argument against a determination in advance. Upon no ground, however, can the action of the courts in passing upon a hypothetical case be justified.

The Circuit Court of Appeals held that section 2984 was mandatory. But that is immaterial, since no case requiring action by the Secretary ever arose. And the fact that the duty of the Secretary to act is mandatory does not authorize the courts to act for him.

It is said the demurrer admits that the goods would have been destroyed but for the salvors. But it was neither alleged nor conceded, since the fact was otherwise, that the goods had been destroyed and proof to that effect satisfactory to the Secretary had been made, as the statute requires. Besides, the petition merely states that the sugar "was in danger of being destroyed by fire" and was saved "from destruction by said fire," whereas section 2984 refers only to "*accidental* fire," and there was no proof that the fire was accidental.

Because of the importance of the questions involved and the manifest error committed, the writ prayed should issue.

HENRY M. HOYT,
Solicitor-General.

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